

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAFECO INSURANCE COMPANY OF
AMERICA,

Plaintiff,

v.

LORI CHIANG, ROBERT CHIANG, and
CHIANG CM CONSTRUCTION COMPANY,
INC.,

Defendants.

No. C-04-1977-SC

AMENDED FINDINGS OF
FACT AND
CONCLUSIONS OF LAW

I. INTRODUCTION

Plaintiff Safeco Insurance Company of America ("Plaintiff" or "Safeco") brought this action against Defendants Lori Chiang, Robert Chiang, and Chiang CM Construction Company, Inc. (collectively, "Defendants" or "CM"), alleging causes of action for, inter alia, breach of an indemnity agreement and equitable indemnity.¹

¹ The Court has jurisdiction over this matter based on diversity of the parties. Complaint ¶ 6. Safeco is a citizen of Washington and all Defendants are citizens of California. Id.

A two-day bench trial was held on August 1 and 2, 2006 on the legal and factual issues in this case.

II. BACKGROUND

Safeco, acting as surety, issued to CM seven payment and performance bonds ("Bonds") on various construction projects on which CM was the general contractor. Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 2 ("Defs.' Mem."). As part of this, CM "executed in Safeco's favor a general agreement of indemnity" ("Indemnity Agreement"), which provides for the defense and indemnification of Safeco for

[a]ll loss, costs, and expenses of whatsoever kind and nature, including courts costs, reasonable attorney fees (whether [Safeco] at its sole option elects to employ its own attorney, or permits or requires [Defendants] to make arrangements for [Safeco's] legal representation), consultant fees, investigative costs and any other losses, costs or expenses incurred by [Safeco] by reason of having executed any Bond, or of any Default under this agreement by any of the [Defendants].

Declaration of Robert Ho in Opposition to Motion for Summary Judgment ("Ho Decl."), Ex. A at 1. The Indemnity Agreement also states that CM will pay Safeco

[u]pon demand...[a]n amount sufficient to discharge any claim made against [Safeco] on any Bond [sic]. This sum may be used by [Safeco] to pay such claim or be held by [Safeco] as collateral security against any loss on any bond [sic].

Id.

Safeco was named as a defendant in four lawsuits ("Suits").

They are:

A. Romak Iron Works, Inc. v. Owa Steel, Inc., et al.

Romak Iron Works, Inc. named Safeco as a defendant in a 2002

¶¶ 1-4. Also, the amount in controversy is alleged to be greater than \$75,000.00, exclusive of interests and costs. Id. ¶ 6.

1 suit in the San Francisco Superior Court. Defs.' Mem. at 3. At
2 trial, Bruce S. Echigoshima, an employee of Safeco, testified that
3 he informed Defendants about the pending litigation, but never
4 received a response. Default was entered against Safeco for
5 failure to file timely responsive pleadings. Safeco then retained
6 its own counsel, who was able to have the default vacated. Pl's.
7 Mem. at 5. Eventually, Defendants provided both a defense and a
8 promise to indemnify Safeco. Defs.' Mem. at 3. After a trial
9 decision in Romak's favor, CM "satisfied the judgment in Romak's
10 favor in full." Id.

11 Safeco insists that it should be compensated, per the
12 contract, for the money it paid in attorney, investigator, and
13 consultant fees to have the default removed, and for fees and
14 costs incurred for monitoring the underlying claims against the
15 Bonds, including active participation in settlement of the Romak
16 Iron action. Reply at 7.

17 B. Ki-Man Song, et al. v. Jin Construction & Electric Co.,
18 et al.

19 In September 2003, employees of Jin Construction filed a
20 lawsuit in the Northern District of California against Jin
21 Construction, CM, and Safeco. Defs'. Mem. at 4.

22 Defendants assert that the "[d]efense in this case has been
23 conducted by [a law firm] at CM's entire cost and expense and at
24 no cost to Safeco. No damages have been assessed against CM or
25 Safeco in this case." Defs'. Mem. at 5.

26 Again, Safeco insists that it should be compensated, per the
27 contract, for the money it paid in attorney, investigator, and
28 consultant fees.

1 At trial, Robert Chiang testified that he has settled the Ki-
2 Man Song case. The Court has heard since then that Robert Chiang
3 has paid the settlement amount in full.

4 C. The Last Two Suits: Wong Woong Im, et al. v. Jin
5 Construction Co., et al. and Chong Duk Kim, et al. v.
6 S.F.U.S.D., et al.

7 Defendants provided a defense to Safeco in the Wong Woong Im
8 action, which the Honorable Susan Illston of the Northern District
9 of California dismissed in September 2004. See Defs.' Mem. at 5.
10 "No damages were rendered against Safeco in this case, nor did
11 Safeco incur fees for its defense in this case because Defendants
12 provided a complete defense to Safeco pursuant to the indemnity
13 agreement." Id.

14 Again, Safeco insists that it should be compensated, per the
15 contract, for the money it paid in attorney, investigator, and
16 consultant fees.

17 At trial, Robert Chiang testified that the Chong Duk Kim
18 action, which has essentially the same plaintiffs as the Wong
19 Woong action, has settled. The Court has heard since then that
20 Robert Chiang has paid the settlement amount in full.

21 Safeco alleges that in response to all these Suits, it
22 "investigated and continues to investigate these claims, and as a
23 result has incurred and continues to incur loss, cost and
24 expense." Plaintiff's Memorandum in Support of Motion for Summary
25 Judgment at 2 ("Pl.'s Mem.").

26 At trial, Safeco asserted that Defendants owe Plaintiff
27 \$25,529.33.
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1 **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

2 The Court finds that Defendants have breached the Indemnity
3 Agreement by (1) failing to pay for the costs associated with the
4 litigation of the Suits and (2) failing to give collateral
5 security when Plaintiff demanded it.

6 A. Attorney, Investigator, and Consultant Fees

7 In California, the elements for a cause of action for breach
8 of contract are: (1) the existence of a contract, (2) plaintiff's
9 performance or excuse for non-performance, (3) defendant's breach
10 and (4) damages resulting to plaintiff because of the breach.

11 See Armstrong Petroleum Corporation v. Tri-Valley Oil and Gas
12 Company, 116 Cal. App. 4th 1375, 1391, FN 6.²

13 The parties do not dispute that there is a contract (the
14 Indemnity Agreement) nor that Plaintiff performed under the
15 contract by issuing the Bonds to CM. The question for the Court
16 is whether Defendants breached the contract and whether this
17 breach resulted in damages to the Plaintiff.

18 The Indemnity Agreement, cited above, grants Plaintiff quite
19 broad coverage for "[a]ll loss, costs and expenses of whatsoever
20 kind and nature including reasonable attorney fee...consultant

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22 ² The Court determined that the Indemnity Agreement is
23 governed by the law of California, though the agreement is silent
24 on the issue of what state law governs it and Plaintiff is a
25 resident of Washington. In determining this, the Court looked to
26 California Civil Code § 1646 and to the Restatement, as required by
27 Shannon-Vail Five Inc. v. Bunch, 270 F.3d 1207, 1210 and to
28 Washington state law. The Court took into account the fact that
the Indemnity Agreement was executed in California, that the
underlying public works projects were in California, and the surety
bonds were issued in California. See Plaintiff's Supplemental
Briefing Regarding Applicable Law at 2-4. Furthermore, the parties
stipulated that they believed the contract to be governed by
California law.

1 fees, investigative costs" incurred by Plaintiffs "by reason of
2 having executed any Bond."

3 The parties don't dispute that Plaintiff incurred expenses
4 for attorneys, consultants, and investigators. The issue in
5 dispute, as stated in the papers and at trial, was whether these
6 expenses and the amount of the demand were reasonably incurred and
7 whether the amounts themselves were reasonable.

8 The Court finds that the Defendant breached the contract and
9 this breach caused damage to the Plaintiff by requiring it to hire
10 attorneys, investigators, and consultants. The Court finds that
11 it was reasonable for Plaintiff to hire attorneys, investigators,
12 and consultants to participate in and monitor the on-going Suits.
13 Because of Defendants' failure to take up Plaintiff's side in the
14 Romak action, default was entered against Plaintiff. After such
15 an action, any reasonable party would be concerned that its
16 interests were being properly taken care of. From that point,
17 Plaintiff's decision to hire counsel and others to assist in and
18 monitor the litigation of the Suits was reasonable. Also, because
19 Safeco's potential exposure on the Suits was enormous, Plaintiff's
20 cautionary measures were entirely reasonable. Furthermore, the
21 Court finds that the amounts spent on those cases were reasonable.
22 Accordingly, the Court AWARDS Plaintiff \$25,529.33.

23 The Indemnity Agreement also states that, upon demand,
24 Defendants shall pay the Plaintiff "all loss, costs and expenses
25 of whatsoever kind and nature, including court costs and attorneys
26 fees . . . , consultant fees, investigation costs and any other
27 losses, costs or expenses . . . incurred by it on account of any
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1 Default under this agreement by any of the Undersigned."

2 Indemnity Agreement (Admitted into Evidence as Plaintiff's Ex. 1)
3 at 1 (emphasis added). The Indemnity Agreement defines "default"
4 to include, inter alia, in situations in which the undersigned
5 "[b]reaches, fails to perform, or comply with any provision of
6 this agreement." Id. Having found that Defendants breached the
7 Indemnity Agreement, the Court FINDS as a matter of law that
8 Defendants are jointly and severally liable to Plaintiff for
9 reasonable attorneys fees incurred in Plaintiff's prosecution of
10 this action.

11 B. Collateral Security

12 Though Defendants have made statements at various times
13 indicating that the Ki-Man Song case and the Chong Duk Kim case
14 have both settled, the Court has yet to receive official
15 confirmation of the settlement of either case. The Court
16 therefore finds that Plaintiff is entitled under the Indemnity
17 Agreement to demand collateral security from Defendants in the
18 amount of \$500,000.00 to protect Plaintiff from any possible
19 liability flowing from these cases. Accordingly, the Court AWARDS
20 Plaintiff \$500,000.00 in collateral security.

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22 **IV. CONCLUSION**

23 The Court finds that Defendants breached the Indemnity
24 Agreement and therefore Plaintiff is owed damages in the amount of
25 \$25,529.33, collateral security in the amount of \$500,000.00, and
26 attorney's fees in the amount listed in the Amended Judgment. The
27 Court finds that these Defendants are jointly and severally liable
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1 for paying these damages.

2 Accordingly, the Court finds in favor of Plaintiff Safeco
3 Insurance Company of America and against Defendants Lori Chiang,
4 Robert Chiang, and Chiang CM Construction Company, Inc.

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6 IT IS SO ORDERED.

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8 Dated: February 7, 2007

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12 UNITED STATES DISTRICT JUDGE
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